regarded as an indication of the adoption of a correspondingly advanced general policy. The opinion in the principal case fortifies that previous comment, and seems to indicate the court's responsiveness to the advancing needs of civilization. P. P. F.

CONTROL BY THE JUDICIARY OVER THE CHIEF EXECUTIVE OF A STATE.—The jurisdiction of the courts over executive officers, including governors of States, heads of executive departments of the general government, and others of a kindred nature, has given rise to questions of much difficulty, and especially is this true with reference to the control by the courts over the official action of the governors of the various States. It is settled beyond all controversy that courts cannot, by injunction, mandamus, or other process, control or direct the head of the executive department of the State in the discharge of any executive duty involving the exercise of his discretion. This necessarily follows from the constitutional division of the State government into three coordinate, distinct, and independent branches. Neither is responsible to the other for the manner in which it exercises its discretion in the performance of duties which are governmental or political in their character. Thus far there is no conflict of judicial authority. The conflict arises upon the question whether the rule stated is subject to the qualification that where duties purely ministerial in character are conferred upon the chief executive, and he refuses to act, or when he assumes to act, acts in violation of the constitution and laws of the State, he may be compelled to act, or restrained, as the case may be, by the courts at the suit of one injured thereby in his personal or property rights. Upon the application of this qualification the authorities are in direct and irreconcilable conflict.

Thus, in a recent case, we find the Supreme Court of Minnesota, after a gradual change of policy in regard to other executive officers, when called upon to decide the question of its power to grant a writ of certiorari to review the decision of the governor in removing a county official from office, holding that when duties are imposed by law upon the chief executive, purely ministerial in their nature, which do not necessarily pertain to the functions of the office, but which might have been imposed upon any other State officer, they are subject to judicial control. *State ex rel. Kinsella* v. *Eberhart* (Minn. 1911), 133 N. W. 857.

The history of the complete reversal of policy in that State is interesting as an exemplification of the present spirit of extensive judicial control. In *Rice* v. *Austin,* 19 Minn. 103, mandamus against the Governor was refused upon the ground that there was no distinction between ministerial and other duties imposed upon the chief executive, the departments of the State government being made separate, distinct, and independent by reason of the constitution. Upon the authority of this case, the court in *State* v. *Dyke,* 20 Minn. 363, where mandamus was sought against the State Treasurer and Secretary of State, extended the doctrine and held that the court could not control the actions of *any* member of the executive department. This was accepted as the law of the State in various decisions dating from 1874 until 1897, no distinction being made between the governor and other members of

the executive branch of the government. All stood upon the same ground, and were considered absolutely immune from judicial control. In 1897, the case of *Hayne* v. *Metropolitan Trust Co.*, 67 Minn. 245, presented a peculiar situation, and marks a radical departure from the broad principle upon which the previous decisions were based. The State Auditor declined to turn over to the court certain funds which he held in trust for private parties. Justice MITCHELL, after calling attention to the previous cases, stated that this court had undoubtedly gone further than any other in holding executive officers of the State exempt from judicial control in the performance of their official duties, especially as to executive officers other than the Governor. It was therefore held that the State Auditor was subject to the jurisdiction of the courts. Finally in the case of *Cooke* v. *Iverson*, 108 Minn. 388, after a complete review of the Minnesota decisions, it was decided that the performance of duties, purely ministerial in character, conferred upon executive officers may be controlled by the judiciary, and though it was not necessary to the decision, the court said that the same rule would apply to the chief executive. It is now seen by the principal case that after a complete change of front and reversal of former policy, this dictum has been accepted and confirmed. The decisions of the courts of last resort in the following States: *Tennessee & Coosa R. Co.* v. *Moore*, 36 Ala. 371; *Harpending* v. *Haight*, 39 Cal. 189; *Greenwood Cemetery Land Co.* v. *Routt*, 17 Colo. 156; *Martin* v. *Ingham*, 38 Kan. 641; *Traynor* v. *Beckham*, 116 Ky. 13; *Magruder* v. *Swann*, 25 Md. 173; *Groome* v. *Gwinn*, 43 Md. 572; *Chumasero* v. *Potts*, 2 Mont. 242; *State* v. *Thayer*, 31 Neb. 82; *Laughton* v. *Adams*, 19 Nev. 370; *Cotten* v. *Ellis*, 52 N. C. 545; *State* v. *Chase*, 5 Ohio St. 528; *State ex rel Irvine* v. *Brooks*, 14 Wyo. 393; are in accord with this view.

The following decisions however cannot be classified as they do not squarely meet the question of control of the governor as to a purely ministerial duty. *Insane Asylum* v. *Wolfly*, 3 Ariz. 132; *State ex rel. Lockwood* v. *Kirkwood*, 14 Iowa 162; *Mott* v. *Penn. R. Co.*, 30 Pa. St. 33; but see *Hartranft's Appeal*, 85 Pa. St. 433; and *Com.* v. *Wickersham*, 90 Pa. St. 311; *Mauran* v. *Smith*, 8 R. I. 192; *Woods* v. *Sheldon*, 9 S. D. 392; *Houston Tap & B. R. Co.* v. *Randolph*, 24 Tex. 317; *Goff* v. *Wilson*, 32 W. Va. 393.

On the other hand the opposite doctrine is held in *Hawkins* v. *Governor*, 1 Ark. 570; *State ex rel. Bisbee* v. *Drew*, 17 Fla. 67; *State ex rel. Low* v. *Towns*, 8 Ga. 360; *People ex. rel. Bacon* v. *Cullom*, 100 Ill. 472; *Hovey* v. *State*, 127 Ind. 588; *In re Dennett*, 32 Me. 508; *People ex rel. Sutherland* v. *Governor*, 29 Mich. 320; *Vicksburg & M. R. Co.* v. *Lowry*, 61 Miss. 102; *State ex rel. Robb* v. *Stone*, 120 Mo. 428; *State, (Gledhill, Prosecutor)* v. *The Governor*, 25 N. J. L. 331; *Jonesboro F. B. & B. Gap. Turnp. Co.* v. *Brown*, 8 Baxt. 490; *Oliver* v. *Warmoth*, 22 La. Ann. 1; *People ex rel. Broderick* v. *Morton*, 156 N. Y. 136. In these States the courts are unanimous in denying all judicial control of the chief executive, regardless of whether the act whose compulsory performance is sought be merely a ministerial one, involving the exercise of no judgment or discretion whatever. The fundamental principle underlying these decisions, is drawn from those provisions found in the constitutions of the several States, that the executive, judicial, and legislative departments into which the government is divided shall be distinct and inde-

pendent of one another, and that the officers of one shall discharge none of the functions of either of the others. It being considered that the executive and judiciary are absolutely independent of each other within the sphere of their respective powers, it is said that neither can be subject to the control of the other in any way. Judge COOLEY thus states the principle: "Our government is one whose powers have been carefully apportioned between three distinct departments, which emanate alike from the people, have their powers alike limited and defined by the constitution, are of equal dignity, and within their respective spheres of action equally independent. One makes the law, another applies the laws in contested cases, while the third must see that the laws are executed. This is a necessity in all free governments, and the very apportionment of power to one department is understood to be a prohibition of its exercise by either of the others. The executive is forbidden to exercise judicial power by the same implication which forbids the courts to take upon themselves his duties." *People ex rel. Sutherland* v. *Governor,* 29 Mich. 320, 324. This argument has been met and answered by the authorities which maintain that only in a restricted sense are the separate departments of the government independent of one another as follows: "There is no such thing as absolute independence. Where discretion is vested in terms, or necessarily implied from the nature of the duties to be performed, they (the departments) are independent of each other, but in no other case. Where discretion exists, the power of each is absolute, but there is no discretion where rights have vested, under the constitution or by existing laws." *People ex rel. McCauley* v. *Brooks,* 16 Cal. 11, 40.

To the same effect, in *Martin* v. *Ingham,* 38 Kan. 641, 656, the court while recognizing the supremacy of each department within its respective sphere says: "But the executive department can enforce the statutory laws only as the legislature has enacted them; and, where the courts have construed the laws (statutory or constitutional) in the determination of controversies, the executive department can enforce them only as thus construed, and is bound to see that the laws are thus construed, and the judgments and orders of the courts rendered or made in the determination of controversies, are respected and obeyed. Thus while each of the different departments of the government is superior to the others in some respects, yet each is inferior in other respects. Each in its own sphere is supreme. But each outside of its own sphere is weak and must obey."

Another argument is founded upon the governor's control of the military arm of the State, and upon the lack of physical power in the court to enforce its decrees against that officer, should he refuse to obey. This argument has been met by saying that: "the jurisdiction of a court does not depend upon its physical ability to enforce its judgments." *State ex rel. Irvine* v. *Brooks,* 14 Wyo. 393. The opposite view would prevent the issuing of any subpoenas or other writ or process from any court to the governor, or from ever arresting him for anything whatever, because, "he might in any such case refuse to obey the writ or order of the court, and might call on the militia to assist him in his resistance." *Martin* v *.Ingham, supra.* "A Court should not anticipate that the governor will not obey its judgment." *Traynor* v. *Beckham,* 116 Ky. 13.

As early as the case of *Marbury* v. *Madison*, 1 Cranch 170, Chief Justice MARSHALL said: "It is not by the office of the person to whom the writ is directed, but by the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined." Every officer is amenable to the laws, and if the legislature sees fit to impose purely ministerial duties, involving no discretion, upon the chief executive, why should he be immune from their performance? As to such duties it seems that the general principle of allowing relief against ministerial officers should apply, and the mere fact that it is the governor against whom the relief is sought, should not deter the courts from the exercise of their jurisdiction. The authority of the courts is supreme in the determination of all legal questions judicially submitted to them within their jurisdiction, and no one is exempted from the operation of the law. Moreover the duty of faithfully executing the laws is solemnly enjoined upon the governor by his oath of office. If the relief sought were refused, those persons whose rights had been invaded by executive neglect or refusal to act, would very often be altogether without redress. No one desires an unwarrantable encroachment or interference by the courts with acts of the executive within his proper sphere of duty, but, when duties are imposed upon the governor in regard to which he has no discretion and in the execution of which individuals have a direct pecuniary interest, and there is no other adequate remedy, they should have protection and an enforcement of justice.

The danger in the application of the rule lies in the difficulty of distinguishing between so-called political or executive duties, and those which are definitely defined to be performed in some particular manner. That the delicacy of the task presented to the courts might, in a close case, cause them to overstep the limits of their power seems to be the only valid objection of the courts holding this view. Large discretion in determining the character of all acts to be performed by the governor might, it is said, infringe upon the right of that executive to use *his* discretion in determining the same question. But is it to be supposed that the courts, any more than the governor, will overstep the limit of the powers conferred or will exercise an unwarranted jurisdiction? Possibly there would be a tendency that the courts, in determining what is a ministerial duty, might exert a control over the executive department, and might in a way deprive it of its right of discretion. Is this a sufficient reason for giving an absolute immunity to the governor from all control, even in a clear case where the duty is plainly ministerial, and has so been held as regards other executive officers? To the writer it seems not. The legislature could readily obviate all difficulty in the matter by conferring upon the governor only such duties as are *clearly* executive and political in their nature. N. K. F.

WHAT CONSTITUTES AN APPEARANCE IN AN ACTION FOR DIVORCE.—Petition for divorce by a resident of New Jersey. The divorce act of 1907 of that State provides that a defendant is to be brought under the jurisdiction of the court by personal service or if a non-resident by publication. Defendant was a resident of New York. Neither of these methods was employed, but in-